

In the Court of Appeal of Alberta

Citation: Bellatrix Exploration Ltd v BP Canada Energy Group ULC, 2021 ABCA 148

Date: 20210429
Docket: 2001-0039AC
Registry: Calgary

Between:

Bellatrix Exploration Ltd.

Appellant

- and -

BP Canada Energy Group ULC

Respondent

- and -

**PricewaterhouseCoopers Inc. in its capacity as the Court Appointed Monitor of Bellatrix
Exploration Ltd.**

Respondent
(Monitor)

Corrected judgment: A corrigendum was issued on April 30, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

**The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Jo'Anne Strekaf
The Honourable Madam Justice Jolaine Antonio**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice C.M. Jones
Dated the 4th day of February, 2020
Filed on the 5th day of March, 2020
(Docket: 1901 13767)

Memorandum of Judgment

The Court:

Introduction

[1] The issue on this appeal was whether Bellatrix Exploration Ltd (Bellatrix), a company granted protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (CCAA), could disclaim an agreement to supply natural gas to BP Canada Energy Group ULC (BP).

[2] The appeal is dismissed as it has become moot and we decline to exercise our discretion to decide same. While the appeal raises an important question of legislative interpretation, the issue is not “evasive of review” and would benefit from being fully litigated on a fulsome evidentiary record in the context of a live controversy.

Background and Discussion

[3] Bellatrix had entered into a long-term arrangement to supply natural gas to BP pursuant to a GasEDI Base Contract and Special Provisions for GasEDI Base Contract, both dated as of March 1, 2010, and related transaction confirmations (collectively the GasEDI Contract). When the GasEDI Contract was executed, the market price of natural gas in Alberta was depressed by an overabundance of supply. BP owned pipelines which permitted the natural gas to be transported to markets outside Alberta where the natural gas could be sold for a higher price. The GasEDI Contract required Bellatrix to deliver natural gas to BP at an agreed delivery point in Alberta priced at a formula expressed as the average of various natural gas spot prices on a month-to-month basis, less a fixed transportation fee, until October 31, 2020.

[4] Bellatrix was granted protection under the CCAA by an initial order dated October 2, 2019. The CCAA permits corporations undergoing restructuring to disclaim certain ongoing contractual obligations. As the price differential between the Alberta price and the price in the other markets in the pricing formula had narrowed, Bellatrix estimated that it could realize an additional \$14.2 million by disclaiming the GasEDI Contract and delivering its natural gas to other purchasers in Alberta, rather than to BP at the price in the GasEDI Contract. With approval of the court appointed monitor, Bellatrix sent BP a Disclaimer Notice on November 25, 2019 with respect to the GasEDI Contract and ceased delivering natural gas to BP on November 26, 2019.

[5] BP applied to the court in the CCAA proceedings for a declaration that the GasEDI Contract was an “eligible financial contract”, as defined in the *Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act)*, SOR/2007-257 (*Regulations*), and therefore could not be disclaimed pursuant to s 32(9)(a) of the CCAA.

[6] The CCAA judge concluded that the GasEDI Contract qualified as an eligible financial contract that was statutorily exempt from disclaimer for purposes of the CCAA proceedings: *Bellatrix Exploration Ltd, Re*, 2020 CarswellAlta 350, [2020] AJ No 329 (Decision).

[7] Bellatrix's application for leave to appeal the Decision to this Court was granted: *Bellatrix Exploration Ltd v BP Canada Energy Group ULC*, 2020 ABCA 178. The appeal was argued in October 2020 and the decision reserved.

[8] In the course of the continuing CCAA proceedings, Bellatrix's assets were sold to a third party. An order granted in May 2020 authorized the bulk of the sale proceeds to be distributed to Bellatrix's first secured creditors (First Lien Lenders) in partial satisfaction of their claims. Certain funds were held back, including funds with respect to BP's disputed claim. A judge in the CCAA proceedings was asked to determine which parties were entitled to the funds that had been held back - the First Lien Lenders or BP. In a decision rendered on December 22, 2020, she concluded that the First Lien Lenders were entitled to those funds: *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809. Leave to appeal to this Court was denied: *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85.

[9] The practical result of the December 22, 2020 decision is that no distributions will be made to BP in the CCAA proceedings. Accordingly, this appeal has been rendered moot.

[10] As was noted by the Supreme Court in the well-known case of *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353, a matter is moot:

... when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties... This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

[11] A court has discretion to hear a matter that is moot in appropriate circumstances. The factors considered include:

- the presence of an adversarial relationship;
- concerns relating to judicial economy;
- the importance of the question;
- whether the issue is "capable of repetition, yet evasive of review" (*Borowski* at p 345)
- the court's proper law-making function.

[12] There are two main issues on this appeal. The first issue involves the interpretation of the phrase “eligible financial contract” and, in particular, the phrases “financial agreement”, “derivatives agreement”, and “the subject of recurrent dealings in the over-the-counter commodities market”, as contained in the *Regulations*. This language was introduced in 2007 when the *CCAA* was amended and the *Regulations* passed and has yet to be considered by an appellate court. Previous appellate decisions, relied upon by the *CCAA* judge in the Decision, considered the issue in the context of prior legislation, which used different language and referred to “forward commodity contracts”: see *Blue Range Resource Corp (Re)*, 2000 ABCA 239; *Re Androscoggin Energy LLC* (2005), 2005 CanLII 3581, 195 OAC 51 (ONCA).

[13] The second issue on this appeal is whether the GasEDI Contract, on the evidence before the court, qualifies as an “eligible financial contract”.

[14] While the appeal raises important questions of statutory interpretation as to the meaning of the phrase “eligible financial contract” for the purposes of the *CCAA* and *Regulations*, that issue is not evasive of review. In our view, this issue would benefit from being fully litigated on a fulsome evidentiary record in the context of a live controversy, instead of being determined on the record before us in a matter that has become moot.

Conclusion

[15] The appeal is accordingly dismissed on the basis of mootness.

Appeal heard on October 22, 2020

Memorandum filed at Calgary, Alberta
this 29th day of April, 2021

“Strekaf J.A.”

Authorized to sign for: Rowbotham J.A.

“Strekaf J.A.”

Strekaf J.A.

“Strekaf J.A.”

Authorized to sign for: Antonio J.A.

Appearances:

R.J. Chadwick
J. Rosenthal
C. Fox
 for the Appellant

H.A. Gorman, Q.C.
G. Benediktsson
 for the Respondent

J.G.A. Kruger, Q.C.
R. Gurofsky
 for the Monitor

Corrigendum of the Memorandum of Judgment

The date the appeal was heard has been amended to read “Appeal heard on October 22, 2020”.